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In the Supreme Court of the United States

LAWRENCE S. ALLEN, M.D., MICHAEL K. MILLER, M.D., TIMOTHY R. COLLINS, M.D., AND COLORADO PERMANENTE MEDICAL GROUP, P.C.

Petitioners,

v.

KAREN PACHECO,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Colorado

AMICI CURIAE BRIEF OF THE CIVIL JUSTICE ASSOCIATION OF CALIFORNIA AND THE CALIFORNIA CHAMBER OF COMMERCE IN SUPPORT OF PETITIONERS

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MOTION TO FILE AMICI CURIAE BRIEF IN SUPPORT OF PETITIONERS

Petitioners have consented to the filing of an amici curiae brief by the Civil Justice Association of California (CJAC) and the California Chamber of Commerce (CCC), but respondent refused to consent to its filing. Accordingly, CJAC and the CCC hereby move, pursuant to Supreme Court Rule 37.2(b), for leave to file a brief amici curiae in support of petitioners Lawrence S. Allen, M.D., et. al., in their Petition for a Writ of Certiorari.

The brief immediately follows this motion.

Respectfully submitted,

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INTEREST OF AMICI CURIAE[1]

Amici – the Civil Justice Association of California (CJAC) and the California Chamber of Commerce (CCC) – are vitally interested in the issue presented by this case—*viz.*, whether a state can, as Colorado has done here, prohibit or impede the ability of health plans and their members to enter into agreements to submit future disputes between them to binding arbitration.

The answer to this question turns on another: whether state restrictions on arbitration have to do with "the business of regulating insurance" or with something else. If they involve something else, then the Federal Arbitration Act (FAA) preempts states from invalidating arbitration agreements on any grounds other than what would invalidate contracts generally. If the anti-arbitration statute was enacted to regulate the "business of insurance," however, then the "reverse preemption" of the McCarran-Ferguson Act trumps the FAA's preemptive protection for arbitration.

The petition for certiorari here seeks relief from the Colorado Supreme Court's decision that its statutory restriction on arbitration agreements between health plans and their members need *not* comply with the FAA because they concern the "regulation of insurance," a matter exempt from the FAA by the McCarran-Ferguson Act.

Unfortunately federal and state courts are all over the board on whether state restrictions on arbitration concern the "business of regulating insurance" and what, as a matter of

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[1] This brief was written in its entirety by the counsel for the amici listed and not at all by any of the parties or their counsel. Further, the CCC and CJAC made the only monetary contributions toward the preparation of this brief.

federal law, this means. There is no uniform test used or agreed upon by the federal circuit courts or state supreme courts; and the resultant crazy-quilt of conflicting decisions leaves health plans, legislatures and courts in a quandary over whether and to what extent arbitration can be used in lieu of court to resolve disputes.

Resolution of this issue is of tremendous importance to the public. Most people obtain their medical care through group plans, what are popularly known as health maintenance organizations or preferred provider organizations. Most of these plans are structured similarly to the Colorado health plan here (Pet.App. 36a), and require (as a condition of membership) acceptance of binding arbitration to resolve future differences between the plan or its health care providers and the plan's members.[2]

Arbitration is used by medical plans because it is less costly, more informal, and more expeditious than full-dressed court battle. Arbitration allows more dollars paid by plan members and their employers for health coverage to go to medical services instead of to the seemingly black-hole of conventional litigation.

CJAC is a nonprofit organization of businesses, professional associations and local governments. Its principal purpose is to educate the public about changes in California's

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[2] As noted in Petitioners' brief, Respondent's husband received medical services from Petitioner Colorado Permanente Medical Group ("Medical Group"), through his health coverage with Kaiser Foundation Health Plan of Colorado ("Health Plan"). Health Plan operates principally as a group practice prepaid health plan and contracts for medical services exclusively with Medical Group. The contract for health coverage between Respondent's husband and Health Plan included the provision requiring arbitration of malpractice claims.

civil liability laws that will promote fairness, economy and efficiency. Arbitration is a form of alternative dispute resolution that CJAC's members favor because it is equally fair to the parties but more economical and expeditious than court litigation.

The CCC is the largest broad-based employer representative in California. Its membership represents one-quarter of the private sector jobs in California and includes firms of all sizes and companies from every industry throughout the state. Many of the Chamber's members are employers who provide medical coverage for their employees through health plans. These plans, much like the health plan in this case, condition enrollment by members on their acceptance of binding arbitration to resolve future disputes.

Amici have consistently opposed, so far successfully, attempts in the past two California legislative sessions to enact laws similar to Colorado's that would bar health plans and their members from agreeing, as a condition of joining the plans, to resolve future disputes between them by binding arbitration.[3] We believe that if the Colorado Court's opinion is allowed to stand, it will fuel new attempts in state legislatures and courts to eviscerate mandatory pre-dispute arbitration agreements in a variety of contexts.

The consequence of end-runs around the FAA's preemptive protection of arbitration on the pretext that state anti-arbitration statutes are regulations of insurance entitled to "reverse preemption" by McCarran-Ferguson will be severe: greater costs for goods and services, decreased access to health care for

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[3] See, e.g., SB 458 (2001) and AB 1751(2000), both of which would have barred a health care service plan application or contract from containing a provision requiring enrollees or subscribers to submit to binding arbitration to resolve disputes under the contract.

those most in need of it, and the demise of arbitration contrary to the public interest.

INTRODUCTION AND SUMMARY OF ARGUMENT

Is arbitration "to be, or not to be? That is the question."[4] According to opinions by the Court, it is not just "to be" but to blossom free of state encumbrances. "There are real benefits to the enforcement of arbitration provisions . . . Arbitration agreements allow parties to avoid the costs of litigation;" and end-runs around the FAA's pro-arbitration purposes undermine it by "breeding litigation from a statute that seeks to avoid it." (*Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 122-123 (2001), citing and quoting from *Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265, 275 (1995).) "In creating [through the FAA] a substantive rule applicable in state as well as federal courts, Congress intended to foreclose state legislative attempts to undercut the enforceability of arbitration agreements." (*Southland Corp. v. Keating*, 465 U.S. 1, 16 (1984).)

At least since *Southland Corp. v. Keating, supra*, 465 U.S. 1 and *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991) it has been beyond cavil that the FAA requires enforcement of pre-dispute binding arbitration agreements, even when they are obtained *as a condition* of employment or the rendition of services. But hostility to arbitration, especially from the personal injury bar, finds expression in legislative bills and statutes that seek to prohibit or impose upon it unique requirements not present in other contractual settings.

Colorado's Health Care Availability Act is one of these anti-arbitration laws: it bars arbitration agreements between

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[4] Shakespeare, *Hamlet*, Act III, Scene 1.

patients and health care providers that have, as an essential condition to their formation, the provision of "medical malpractice insurance to such health care provider." (Colo. Rev. Stat. § 13-64-403; Pet. App. 51a.) It also imposes *notice* requirements regarding the size of typeface and specific language content unique to arbitration agreements between patients and health care providers. (*Id.*)

According to the proponents of these laws, they are necessary to ensure that arbitration agreements are "voluntary," a term used repeatedly in the Colorado statute. Their underlying assumption is that *pre-dispute* arbitration agreements, ones entered into as a condition of receiving services or employment, are not voluntary; only *post-dispute* arbitration agreements can be *truly* voluntary. While there is "a facile appeal to this contention [it is] one that on further reflection dissolves from view. . . [P]ost-dispute arbitration agreements are almost never negotiated. It is a chimerical alternative to pre-dispute arbitration agreements." (Samuel Estreicher, *Saturns for Rickshaws: The Stakes in the Debate over Predispute Employment Arbitration Agreements*, 16 *OHIO ST. J. ON DISP. RESOL.* 559, __ (2001).)

The Colorado Supreme Court says the FAA's protective sweep for arbitration is *not* applicable to what that state has decided to do about arbitration agreements between patients and health care providers. Colorado statutorily spells out what "voluntary" means by stating what it *cannot* mean when it comes to these kinds of arbitration agreements. It *cannot* mean, says the statute, an agreement *conditioned* on the provision of medical malpractice insurance coverage between the plan and its health care providers. (Pet. App. 51a.) The FAA has, we are told, nothing to say about this restriction "because the McCarran-Ferguson Act . . . exempts [the Colorado statute] from federal preemption by the FAA." (Pet.App. 17a.) Colorado's high court is not alone in this view;

but can count in its corner the federal Fifth, Sixth and Tenth Circuit Court of Appeals.

A number of other courts, however, when faced with the same question reach the opposite conclusion. Along with the two dissenting justices in this case, the Alabama Supreme Court and the federal courts of appeal for the Second and Ninth Circuits have concluded that the McCarran-Ferguson Act does *not*, but the FAA *does*, apply to their states' arbitration statutes. They reach this conclusion because they also conclude that their state's statutes do not "regulate the business of insurance" but "medical malpractice actions" or something besides the business of insurance. (Pet. App. 26a.)

Whether various contractual arrangements between medical groups, individual physicians and health plans qualify as "the business of insurance" or are simply a means of delivering medical services by health care providers, or controlling "medical malpractice actions," or some hybrid of all these things is, of course, key to answering whether the FAA or the McCarran-Ferguson Act holds sway. It cannot, however, be answered by the mere act of "labeling," no more than calling a dog's tail a leg would bestow upon it five legs. No, the primary nature of the legal arrangement for which an arbitration agreement applies should be determined by a *uniform federal* standard, not by a state unilaterally saying something is "insurance" or trying to make it so by using the term "insurance" in its anti-arbitration statute.

When, as illustrated by this case, judicial opinions on the validity of state anti-arbitration laws reach starkly different conclusions based on the same *federal* statutory authority – something looks wrong. What's wrong is that the law is in a

state of "confusion worse confounded,"[5] a hodge-podge deserving of the Court's guidance so that clarity and uniformity inform the scope and application of intersecting federal statutes. This case presents the opportunity for the Court to provide that guidance.

ARGUMENT

I. THE DECISION OF THE COLORADO SUPREME COURT CONFLICTS WITH THOSE OF FEDERAL APPELLATE COURTS AND WITH THE HIGHEST COURT OF ANOTHER STATE CONCERNING THE SCOPE AND APPLICATION OF THE SAME FEDERAL STATUTES.

An established reason for the grant of certiorari is a direct conflict between the decision of a court of appeals and that of the highest court of a state where that conflict concerns a federal question. (See, *e.g.*, *Katzinger v. Chicago Metallic Mfg. Co.*, 329 U.S. 394 (1947); *Andresen v. Maryland*, 427 US. 463 n. 5 (1976); *Lakeside v. Oregon*, 435 U.S. 333, 336 & n. 3 (1978).) Another strong reason favoring review is a conflict between the highest courts of two or more states on the application and sweep of the same federal statutes. (See, *e.g.*, *St. Martin Lutheran Church v. South Dakota*, 451 U.S. 772, 780 n. 10 (1981); *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 753 n. 1 (1985).) Both are present in this case.

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[5] John Milton, *PARADISE LOST, Book II, Line* 995.

A. The Opinion of Colorado's High Court Conflicts with Opinions of Federal Courts of Appeal on when the McCarran-Ferguson Act Negates the Preemptive Protection of the Federal Arbitration Act.

The Second and Ninth Circuits hold, contrary to the Colorado Supreme Court opinion here, that the McCarran-Ferguson Act does not preclude enforcement of the FAA to controversies involving insurers.

In *Hamilton Life Insurance Co. v. Republic National Life Insurance Co.*, 408 F.2d 606 (2d Cir. 1969), the court held that McCarran-Ferguson does *not* preclude the FAA's preemptive protection of arbitration agreements attendant to insurance unless such compliance conflicts with state laws regulating insurance. At issue was a written agreement which provided that Republic would reinsure a certain percentage of the risks on group life insurance policies written by Hamilton covering civil service employees in the New York City area. That reinsurance agreement contained a broad clause by which the parties promised that "[a]ll disputes and differences between the[m] . . . [would] be decided by arbitration . . .." Republic sought to avoid arbitration and instead resolve its differences in court, a position soundly rejected by the court on the ground that the statute did not "invalidate, impair or supersede applicable State legislation regulating the business of insurance." (*Id.* at 611.) Holding that New York's statute did not regulate the business of insurance, but instead "the method of handling contract disputes generally," the court refused to find the FAA reverse preempted by operation of New York and McCarran-Ferguson. (*Id.*)

Similarly, the Ninth Circuit, in *Bennett v. Liberty National Fire Insurance Co.*, 968 F.2d 969 (9th Cir. 1992) held that Montana's insurance insolvency statute does *not* "regulate the

business of insurance" and preclude applicability of the FAA to a dispute between an insurer and reinsurer. (*Id.* at pp. 972-73.) The court rested its decision on its determination that the liquidator-plaintiff sought to enforce rights primarily derived from the insolvent insurer's *contract* rather than from Montana's insurance insolvency *regulation*. (*Id.* at 970.) The court held that because the underlying dispute between the parties was one of contract, and not one of insurance policyholders' rights, the parties were compelled to arbitrate their dispute pursuant to the FAA. (*Id.* at 972.) *Bennett* found no harm to the liquidator from the provision for an alternative dispute resolution forum. (*Id.* at 973.)

The correctness of the holdings in *Hamilton* and *Bennett* was underscored four years later by *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681 (1996), which held that the FAA preempted a Montana statute that, like Colorado's here, required arbitration agreements to contain a special notice to those who entered into them. In striking down Montana's statute the Court stated that the FAA precludes "States from singling out arbitration provisions for suspect status, requiring instead that such provisions *be placed 'upon the same footing as other contracts*.'" (517 U.S. at 687; emphasis added.)

A year later the Tenth Circuit ruled the opposite in *Davister Corp. v. United Public Life Insurance Co.*, 152 F.3d 1277 (10th Cir. 1998), holding that the McCarran-Ferguson Act exempts a state court's blanket stay order in an insurance liquidation setting from FAA preemption because the stay "manifests a purpose of protecting policyholders." (*Id.* at 1281; accord: *Mutual Reinsurance Bureau v. Great Plains Mut.* 969 F.2d 931 (10th Cir. 1992), cert. den. 506 U.S. 1001 (1992).)

The Fifth and Sixth Circuits join with the Tenth in finding that state statutes regulating liquidation and prohibiting arbitration in such proceedings are protected by McCarran-

Ferguson from federal preemption of the FAA. The Fifth Circuit in *Munich Reinsurance Co. v. Crawford*, 141 F.3d 585, 587 (5th Cir. 1998) imposed a *per se* rule of reverse preemption denying the enforceability of any arbitration agreement in insurance insolvency proceedings. (*Id.* at 595-96.)

The Sixth Circuit, in *Fabe v. United States Department of Treasury*, 939 F.2d 341 (6th Cir. 1991), held that Ohio's comprehensive insurance liquidation statute "protected the interests of the insured" and "regulated the 'business of insurance,'" and was thus protected from federal preemption. (*Id.* at pp. 350-51.) Accepting certiorari in *Fabe*, the Court declined to define the relationship between the McCarran-Ferguson Act and the FAA, but reversed the Sixth Circuit's decision because "to the extent that [the Ohio priority statute involved] is designed to further the interests of other creditors . . . it is *not* a law enacted for the purpose of regulating the business of insurance." (*United States v. Fabe*, 508 U.S. 491, 508 (1993); emphasis added.)

In sum, there is a split between the federal circuits (the second and ninth, on one side, and the fifth, sixth and tenth, on the other) over whether the FAA applies to insurance contracts and what constitutes, as a matter of law, a regulation of "the business of insurance." Now is a good time for this Court to resolve the split by providing clear guidance.

B. The Opinion of the Colorado Supreme Court Clashes Directly with the Opinion of the Alabama Supreme Court on the Application of the Same Two Federal Statutes and How to Determine which Controls when they Clash.

American Bankers Insurance Co. of Florida v. Crawford, 757 So.2d 1125 (Ala. 1999) holds that Alabama's statute, providing that an agreement to submit to arbitration could not be specifically enforced, does not "reverse-preempt" the FAA

under McCarran-Ferguson even though it was incorporated by reference in that state's insurance code.

Crawford relied on Alabama's anti-arbitration law in seeking to avoid submission of his claim against his mortgage insurer to arbitration. In rejecting Crawford's contention that the FAA did not apply because of the reverse preemption of McCarran-Ferguson, the Alabama high court employed the analytical framework established in *United States Department of Treasury v. Fabe*, *supra*, 508 U.S. 491.

Fabe holds that reverse-preemption occurs under McCarran-Ferguson if: "(1) the federal statute at issue does not specifically relate to the business of insurance; (2) the state statute was enacted for the purpose of regulating the business of insurance; and (3) application of the federal statute invalidates, impairs, or supersedes the state statute." (*Id.* at 500-01.) "For reverse preemption to occur," the *American Bankers*' opinion said, "*each* of these three [*Fabe*] factors must be present." (*American Bankers*, *supra*, 757 So. 2d at 1131; emphasis added.)

In applying the *Fabe* factors, the Alabama Court concluded that the first factor was met because the FAA did not specifically relate to insurance. (*Id.* at pp. 1131-1132.) In analyzing the second factor – i.e., was the statute enacted for the purpose of "regulating the business of insurance?" – the court recognized that *Union Labor Life Insurance Co. v. Pireno*, 458 U.S. 119 (1982) established three guidelines for determining this question.

> First, whether the [state statute] has the effect of transferring or spreading a policyholder's risk; second, whether the [statute] is an integral part of the policy relationship between the insurer and the insured; and third, whether the

> [effects of the statute are] limited to entities within the insurance industry.

(*Pireno*, *supra*, 458 U.S. at 129.)

The Alabama Court applied the *Pireno* test and concluded that its anti-arbitration statute was not "enacted for the purpose of regulating the business of insurance" because it did not have the effect of "transferring or spreading a policyholder's risk." (*American Bankers*, *supra*, 757 So. 2d at 1133.) A California appellate court made the same determination with respect to arbitration agreements in the context of the health plans and their members[6], but despite this conclusion decided contrary to Alabama that compliance with this prong of *Pireno* was not necessary for reverse-preemption under McCarran-Ferguson.

Colorado's high court and California's intermediate appellate court, however, resort to different tests under *federal* law from Alabama for determining whether an anti-arbitration statute was enacted "for the purpose of regulating the business of insurance." Colorado and California say, contrary to *American Bankers*, that *not* all three *Pireno* factors must be met before a state arbitration law can be characterized as regulating the "business of insurance." (Pet. App. 14a, n. 8.)[7] Indeed, the Colorado Supreme Court goes even further and says that in making this determination the court need "not specifically rely on the *Pireno* . . . factors . . . ." (*Id.*) Instead the Colorado Court relies principally on language it parses from *SEC v.*

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[6] "It is true that [California's arbitration statute for HMOs] does not transfer risk." (*Smith v. PacifiCare Behavior Health of Cal., Inc.*, 93 Cal.App.4th 139, 161 (2002), *cert. denied*, 537 U.S. 818 (2002) ("*PacifiCare*").)

[7] "[T]he so-called *Pireno* factors are merely 'consideration' to be weighed rather than essential criteria . . .." (*PacifiCare*, *supra*, 93 Cal.App.4th at 154 n. 18.)

National Securities, Inc., 393 U.S. 453 (1969), which "focuses on the relationship between the insurance company and the policyholder." According to the Colorado Supreme Court, any state statute "aimed at protecting or regulating this relationship, either directly or indirectly, is a law regulating the business of insurance." (Pet. App. 14a.)

Now, it doesn't take a soothsayer to see that many measures may well qualify as "indirectly" aimed at "protecting or regulating insurance." This capacious language sweeps within its ambit numerous arrangements that would not pass the commonsense test of what constitutes the "business of regulating insurance." As the dissenting opinion in the Colorado Supreme Court remarks, "[L]egislation requiring drivers to wear seat belts or motorcycle riders to wear helmets would be aimed at the business of regulating insurance because it could have an effect on insurance premiums." (Pet.App. 28a.) Perhaps sensing the disconnect between its own verbal formulae and reality, the Colorado Supreme Court sought to paper over the dilemma by asserting in a footnote that "the relationship between an HMO 'medical service provider' and 'patient' is the relationship between a 'medical insurer' and 'insured.'" (Pet. App. 16a n. 9.)[8]

But the determination of whether a statute impairing agreements to arbitrate "regulates the business of insurance" should not be made *ipse dixit*. A state restriction on arbitration agreements requires critical analysis to see if it comports with a uniform federal standard for ascertaining whether it was

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[8] California takes the same tack: it labels rather than analyzes the relationship of health plans to members, referring to an uncodified declaration in a statute regulating health plans and stating that they "are engaged in the business of insurance . . . for purposes of the McCarran-Ferguson Act." (*PacificCare*, *supra*, 93 Cal.App.4th at 158.)

enacted to regulate "the business of insurance." That examination cannot occur when courts are all over the map as to whether the *Pireno* factors must be met at all and, if so, which or how many of them must be satisfied.

II. THE COURT SHOULD CLEAR UP THE CONFUSION REGARDING APPLICABILITY OF THE *PIRENO* FACTORS UNDER THE FIRST CLAUSE OF § 2(b) OF THE McCARRAN-FERGUSON ACT

The mists of confusion surrounding the issue in this case emanate from Court decisions about the proper standard to be applied under the *first* clause of § 2(b) of the McCarran-Ferguson Act; in particular, whether and to what extent the *Pireno* factors apply in cases involving the first (as distinguished from the second) clause of section 2(b).

Both clauses use the phrase "business of insurance," though the first clause enables state law to preempt federal law "for the purpose of regulating the business of insurance,"while the second clause exempts the "business of insurance" from federal antitrust law when state antitrust law applies. (Pet.App. 50a.) Courts, including this Court, have wrestled with the question of whether the phrase "business of insurance" has the same or different meanings in the two clauses, and whether and to what extent the judicial definitions of "business of insurance" under the antitrust clause guide or bind definitions under the preemption provisions of the first clause.

The first case to tackle the issue, *SEC v. National Sec., Inc.*, *supra*, 393 U.S. 453, arose under the preemption clause of section 2(b). There the Court gave a rather narrow definition of the "business of insurance" that focused on "the relationship between the insurance company and policyholder." (393 U.S. at 460):

> The relationship between insurer and insured, the type of policy which could be issued, its reliability, interpretation, and enforcement, "these were the core of the 'business of insurance.'" But whatever the exact scope of the statutory term, it is clear where the focus was – it was on the relationship between the insurance company and policyholder. Statutes aimed at protecting or regulating this relationship, directly or indirectly, are laws regulating the "business of insurance."

From 1969 until 1993 the Court did not address the first clause of section 2(b), but considered the meaning of the phrase "business of insurance" under the antitrust clause of that section. The principle decisions are *Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205 (1979) and *Union Labor Life Ins. Co. v. Pireno, supra*, 458 U.S. 119 (1982).

In *Royal Drug* the Court explained that the two clauses of section 2(b) had different *purposes* and therefore could have different *meanings*. The first clause's purpose is to preserve state regulation of insurance companies (440 U.S. at 218-19, n. 18), whereas the second clause's goal is to give insurance companies a *limited* exemption from antitrust laws. (*Id.*) Agreements that do not concern the underwriting or spreading of risk and do not directly affect the insured are *not* part of the "business of insurance." (*Id.* at 232-33.) In its analysis, *Royal Drug* cites *National Securities*, in effect narrowing the definition of "business of insurance" under both clauses.

Pireno, as we've seen, announced a three-prong test for determining whether the antitrust clause of the Act exempts a given practice from federal antitrust laws. (See discussion *ante,* at 13-14.) The Court said that no one factor is determinative, but courts should examine the practice in relation to *all three* criteria.

Next came *United States Dep't. of Treasury v. Fabe, supra*, 508 U.S. 491, where the Court again addressed how to apply the *Pireno* criteria in a section 2(b) preemption case. In *Fabe*, a sharply divided Court upheld an Ohio law ranking priorities in liquidation proceedings that conflicted with a federal law giving the federal government first priority to the extent that it protected insurance policy holders. Protection of policy holders was pursuant to a law enacted "for the purpose of regulating the business of insurance," but preferences to employees and other general creditors did *not* escape preemption because their connection to the ultimate aim of insurance was too tenuous. *Fabe* thus gave an expansive reading to the phrase "for the purpose of regulating the business of insurance," stating that its reference in the first clause "consists of laws that possess the end, intention, or aim of adjusting, managing, or controlling the business of insurance [and] . . . *necessarily encompasses more than just the 'business of insurance.'*" (508 U.S. at 505; emphasis added.) Further, *Fabe* states that the first clause is "not so narrowly circumscribed" as the second clause. (*Id.* at 504.)

Fabe provoked a vigorous dissent by Justice Kennedy, who argued that the phrase "business of insurance" should have the same meaning in the first and second clauses, that the *Pireno* criteria should be controlling, and that the Ohio statute at issue failed the *Pireno* test. The dissent predicted the confusion that would reign under the majority opinion. "States attempting to discern the scope of powers reserved for them under the McCarran-Ferguson Act will find it difficult . . . to reconcile our precedents in this area with the decision the Court reaches today." (508 U.S. at 512, dissenting opn. by Kennedy, J.)

Since *Fabe* federal courts continue to be all over the lot on the question of the applicability of the *Pireno* factors to preemption clause cases. Two circuit courts, like the Colorado Supreme Court in the instant case, hold that the *Pireno* test

does *not* apply in preemption clause cases. (*Doe v. Northwest Bank Minnesota,* 107 F.3d 1297, 1305-06 (8th Cir. 1977)(*Pireno* is "relevant only in cases involving a conflict between state law and federal antitrust law"); *Autry v. Northwest Premium Services, Inc.,* 144 F.3d 1037, 1044, n.5 (7th Cir. 1998)(the court "did not understand *Fabe* to require *Pireno* analysis in this situation."))

Other courts disagree. *Merchants Home Delivery Service, Inc. v. Frank B. Hall & Co.,* 50 F.3d 1486 (9th Cir. 1995) opined that *Fabe* applied the *Pireno* test to a preemption clause case. (*Id.* at 1490, n. 2: "In *Fabe*, the Supreme Court actually applied the [*Pireno* test], emphasizing that the acts involved there affected the transfer or spreading of risk.") In *Ambrose v. Blue Cross & Blue Shield,* 891 F.Supp. 1153 (E.D. Va. 1995), *aff'd,* 95F.3d 41 (4th Cir. 1996), the district court said that "although the *Pireno* analysis was developed in cases addressing the second clause of Section 2(b), it is relevant to the first clause for the limited purpose of defining the business of insurance." (*Id.* at 1155.)

The Third Circuit in *Sabo v. Metropolitan Life Insur. Co.,* 137 F.3d 185, 189, n.2 (3d Cir. 1998) found the *Pireno* test useful in a preemption clause case to the extent that it "may" provide guidance in a more generalized analysis. The Eleventh Circuit in *Blackfeet National Bank v. Nelson,* 171 F.3d 1237, 1246, n. 3 (11th Cir. 1999) applied the *Pireno* test in a preemption clause case because: "We cannot imagine that the 'business of insurance' could have two different meanings in the same statutory section."

In sum, courts interpreting *Fabe* have held in preemption clause cases that the *Pireno* test does control, doesn't control, does provide guidance, doesn't provide guidance, is the beginning of analysis, and isn't the beginning of analysis. The record is clear that the decision of the Court in *Fabe* has not

succeeded in imposing order on the chaos under the first and second clauses of section 2(b).

Most recently *Kentucky Ass'n of Health Plans, Inc. v. Miller,* 538 U.S. ___, 123 S. Ct. 1471 (2003) added a new, and for many, additionally confusing wrinkle on the meaning of the "business of insurance." *Kentucky Ass'n* discusses the issue in the context of the Employee Retirement Income Security Act of 1974 (ERISA), which preempts all state laws "insofar as they may now or hereafter relate to any employee benefit plan" (29 U.S.C. § 1144(a)), but saves state laws from preemption when they "*regulate insurance,* banking, or securities." (§ 1144(b)(2)(A).)

Earlier Court opinions applied the *Pireno* test to determine whether certain state laws fell within the preemption saving clause of ERISA. (*Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 48-49 (1987) and *Metropolitan Life Ins. Co. v. Massachusetts,* 471 U.S. 724, 742-743 (1985).) In fact, these cases were prominently cited by the dissent in *Fabe* for the proposition that the *Pireno* test was used in contexts other than the antitrust clause of section 2(b) of the McCarran-Ferguson Act. (508 U.S. at 516.)

Ultimately, the Court throws in the towel on applying the *Pireno* test in the ERISA context. "We believe that our use of the McCarran-Ferguson case law in the ERISA context has misdirected attention, failed to provide clear guidance to lower federal courts, and, as this case demonstrates, added little to the relevant analysis." (123 S. Ct. 1471, 1478.) "Today we make a clean break from the McCarran-Ferguson factors." (*Id.* at 1479.)

Along the way, the Court makes new distinctions that cause additional confusion about the scope of the McCarran-Ferguson Act. For instance, *Kentucky Association* mentions problems applying the *Pireno* test to "state law" rather than to "conduct."

(123 S. Ct. At 1478-79.) Noting that the preemption clause of § 2(b) also refers to state laws, the Colorado Supreme Court used this distinction to justify rejection of the *Pireno* test altogether. However, whereas *Kentucky Association* imposed a rigorous alternative test, the Colorado Supreme Court devised a test loose enough to swallow federal preemption. In other words, the rationale the Court used for rejecting the *Pireno* test in the ERISA context has added confusion to the question of the applicability of the *Pireno* test in preemption cases under section 2(b).

CONCLUSION

For all of the aforementioned reasons, as well as the reasons articulated by petitioners, certiorari should be granted so that the Court can fix what is broken.

Respectfully submitted,

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